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91-1819

No.

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LAGRANGE TRADING COMPANY,
d/b/a AIRLINE BOOKSTORE, .
Petitioner,

vs.

NICKY NICOLOSI,
AARON BROUSSARD,
CITY OF KENNER, LOUISIANA
Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are ample or reasonable alternative avenues of communication provided when a zoning ordinance in a city closes existing retail adult book/video stores and allows any sites, no matter how limited, only in light and heavy industrial zones with additional distance restrictions?

2. Is an Ordinance narrowly tailored to further a substantial government interest when the stated purpose of the Ordinance is to protect the City's neighborhoods and commercial districts but the Ordinance adopted is to close an adult book/video store which has been operating for fifteen years in a Special Industrial Zone?

3. Where the only adult book/video store in the city has existed for fifteen (15) years in a Special Industrial Zone, must the City rely upon evidence related to the problem; that is, an adult bookstore in a Special Industrial Zone or may the City rely upon copies of Ordinances and decisions from other jurisdictions related to adult bookstores generally?

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OPINIONS BELOW

On January 13, 1992, the United States Court of Appeals for the Fifth Circuit affirmed without opinion the decision of the United States District Court for the Eastern District of Louisiana.

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* **DISCLOSURE OF THE CORPORATE AFFILIATIONS PURSUANT TO RULE 29**

All of the stock in LaGrange Trading Company is owned by Mustatara Investments N.V.

The decisions are not reported. The affirmance by the Court of Appeals is Appendix A. The order and decision of the United States District Court is reproduced as Appendix B.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals affirming the decision of the District Court was entered on January 13, 1992. A Petition to Rehear or in the Alternative, a Motion to Stay the Mandate Pending Petition for Writ of Certiorari was denied on February 12, 1992 (Appendix C). Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1254(1) and Rule 10 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 1

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances."

The City of Kenner Zoning Ordinance No. 6333 is printed as Appendix D to this Petition.

STATEMENT OF THE CASE

LaGrange Trading Company, doing business as Airline Bookstore, is an "adult book/video store" as defined in Kenner Zoning Ordinance No. 6333 and had been operating since October 1974 or approximately fifteen (15) years at its location in a Special Industrial Zone at the time of the adoption of the Ordinance in November 1989. LaGrange was the only adult bookstore in Kenner, Louisiana and its location was on Airline Highway (U.S. Highway 61) approximately three blocks from the southeast corner of the New Orleans International Airport.

The City of Kenner, Louisiana enacted zoning ordinance No. 6333, effective November 19, 1989, which required LaGrange to close at its present location on Airline Highway in the Special Industrial Zone within one year (November 19, 1990). LaGrange could apply for a special permit to relocate in very limited areas of the Light or Heavy Industrial Zones of the City, but not in any Special Industrial Zone or Commercial Districts. The Ordinance further required that any location of LaGrange must be a minimum of 1,000 feet from any residence, church, school. nursery, daycare center, or recreational facility or other adult book/video store or massage parlor as measured from the closest property lines.

LaGrange filed a Complaint for Declaratory Relief, Preliminary Injunction, Permanent Injunction and Attorneys Fees pursuant to 42 U.S.C. §1983. The City of Kenner agreed it would forebear enforcement of the Zoning Ordinance challenged in the Complaint pending decision of the District Court and the parties entered into a stipulation of facts. The District Court found the special permit requirement unconstitutional and severed said special permit portion. The District Court found the remaining zoning provisions allowing adult book/video stores only in Light and Heavy Industrial Zones satisfied the requirement that reasonable alternative avenues of communication be provided and dismissed the Complaint on the merits.

A stay of the enforcement of the Ordinance was granted by the District Court pending appeal. The United States Court of Appeals for the Fifth Circuit affirmed per curiam without opinion.

The District Court's opinion that the location permitted reasonable or ample alternative avenues of communication was expressed as follows:

> Hence, that the Kenner Ordinance allows Plaintiffs any available sites seems to meet the current test for alternative avenues of communication.
>
> Slip Opinion, page A-21.

The City of Kenner encompasses an area of approximately fifteen (15) square miles. It is bounded on the north by Lake Ponchatrain, on the south by the Mississippi River, on the east by Jefferson Parish which is part of the suburbs of the City of New Orleans, and on the west by St. Charles Parish. It is bisected by United States Interstate Highway 10. None of the area north of Interstate 10, representing in excess of one-half of the area of Kenner, is zoned Light or Heavy Industrial. The southern portion of the City is dominated by the New Orleans International Airport, which takes up approximately one-half (1/2) of the area.

Small areas around the perimeter of the Airport and one thousand feet (1,000) from restricted residential areas are the only available portions of Light or Heavy Industrial Zones which would meet the requirements of the Ordinance. The streets in those industrial areas deadend into the Airport. Various zoning maps were stipulated by the parties. Attached as Appendix E is a map of the southern portion of the City in which the permitted Light and Heavy Industrial Zones are identified. The City of Kenner has a Special Industrial Zone as well as Light and Heavy Industrial Zones. It also has C-1 Neighborhood Commercial and C-2 General Commercial Zones, in addition to its residential zones.

The stipulation identifies 357.07 acres of Light and Heavy Industrial Zones as developed and available for use without violating the distance requirements. Said Industrial areas are the striped areas around the perimeter of the airport on Appendix E. The Three Hundred Fifty-Seven (357) acres of developed land

available under the Ordinance constitutes 3.9% of the total area of the City (incorrectly identified as 3.9 acres in the District Court opinion). One Hundred Forty (140) acres representing 1.5% of the City is undeveloped industrial land (shaded area of Appendix E) in which there are no streets or utilities. The stipulated report of the real estate expert for the City of Kenner eliminated all Light and Heavy Industrial Zones south of the Airport. The result is only approximately 200 acres of developed land, plus some undeveloped acreage north of the Airport which represents approximately 2.2% of the land area of the City is available to provide ample or reasonable alternative avenues of communication.

The stipulated report of the real estate expert of LaGrange described the available Light and Heavy Industrial zones as found among warehouses and industrial businesses related to the Airport and undeveloped areas barren of structures. The locations have neighborhood street access only and many of the roads are narrow without sidewalks. The areas are unsuitable to a retail use, such as a bookstore or a video rental establishment.

REASONS FOR GRANTING THE WRIT

POINT I

THERE IS AN IMPORTANT NEED TO CLARIFY LEGAL STANDARDS APPLICABLE TO ZONING OF BUSINESS ESTABLISHMENTS DISTRIBUTING SEXUAL MATERIAL

Zoning is the exercise of one of the broadest and most powerful weapons of municipalities and local governments. It is the exercise of the police power. Justice Powell in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310, recognized an increasing urbanized society, where the types of zoning restrictions have taken on forms far more complex and innovative than the ordinance involved in *Euclid*. The District Judge in *Dumas v. City of Dallas*, 648 F.Supp. 1061, *aff'd* 837 Fed.2d 1298, *aff'd in part and rev'd in part on other grounds, FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), held that the law of zoning allows the will of a majority to control the community. The law of free speech, in contrast, prevents the majority from suppressing minority expression. The clash resulted in a body of First Amendment/zoning jurisprudence to reconcile this potential conflict.

Cities and counties have now adopted innovative methods of zoning. The result is that the standards established in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 39 (1986) have been construed by some courts to permit the effective suppression of First Amendment freedoms through the use of zoning regulations. There is a need to clarify the legal standards established in *Young* and *Renton* to prevent further eroding of First Amendment rights.

It is well settled that zoning is an extremely important tool for achieving land-use goals in a municipality. *See, Northend Cinema, Inc. v. City of Seattle,* 585 P.2d 1153 (1978), citing *Village of Belle Terre v. Borras,* 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974). Broadly stated, zoning regulations proscribe the use to which property within certain designated districts may be put.

Zoning laws normally divide cities, towns and counties into residential, commercial and industrial or industrial and manufacturing districts. These general districts may be subdivided, such as residential into single family, two family, or multiple family districts. Commercial may be in neighborhood, general or central business districts. Industrial may be in light and heavy industrial districts, which may include manufacturing or there may be a separate manufacturing district.

The importance of precise and fair zoning standards for businesses distributing material protected by the First Amendment is nationwide. Zoning regulations exist in every city and county in the land. The Videotape Dealers Association reports that three quarters of the nation's video stores carry adult titles which accounts for approximately 13% of the business valued at $250,000,000 annually. *See, Ft. Wayne Books, Inc. v. Indiana,* 489 U.S. 46, 109 S.Ct. 916, note 21 (Justice Stephens dissenting).

Another source estimated that at least 12,000 of the over 20,000 general video outlets across the United States distribute sexually explicit videotapes. (Final report of the Attorney General's Commission on Pornography, July 1986, pp. 1393-1394.)

The nationwide application of clear and uniform time, place and manner standards to these zoning regulations is necessary for the following reasons:

A. Limiting Locations to Industrial Districts.

There is a discernible trend in recent years to prohibit what is generally defined as adult book/video stores in commercial districts and limit the location to light and heavy industrial districts as was done by the City of Kenner. *See Cook County v. Renaissance Arcade,* 522 N.E.2d 73 (Ill. 1988); *World Wide Video v. City of Tukwila,* 816 P.2d 18 (Wash. 1991).

It is important to the public in general and to persons exercising First Amendment rights that legal standards be established as to the circumstances under which the confinement of the exercise of First Amendment rights to light and heavy industrial zones is permissible at all. Will such limits effectively deny an adult book/video store a reasonable opportunity to open and operate within the City. Will industrial zoning deny the public access to these First Amendment materials. The public's access to First Amendment activities might be analogous to the statement in *Deerfield Medical Center v. City of Deerfield Beach,* 661 F.2d 328 (5th Cir. 1981), that customers of an adult bookstore would be adversely affected if the bookstores were restricted "to the most unattractive, inaccessible and inconvenient areas of a city." 661 F.2d at 336. Will the zoning regulations have the effect of suppressing or greatly restricting access to lawful speech.

B. Amortization of Non-Conforming Uses.

The importance of clarifying legal standards is enhanced because the great majority of zoning regulations specifically adopted to control adult book/video stores and similar establishments *amortize* or *terminate* the non-conforming uses. The adult book/video store is required to close at its *present* location eliminating the First Amendment activities completely or has the choice to move to the permitted zones. Many zoning regulations establish distance requirements in addition to relegating the First Amendment activities to industrial zones. The City of Seattle in

Northend Cinema, Inc. v. City of Seattle, 585 P.2d 1153 (1978) adopted the extreme. Bookstores and theaters were to close and move within 90 days. The *Northend* case provided the study relied upon in *Renton*. *Alexander v. Minneapolis*, 698 F.2d 936 (8th Cir. 1983) would have required all five (5) adult-only theaters and seven (7) of ten (10) adult bookstores in the city to close and move. All courts have upheld amortization provisions terminating non-conforming First Amendment uses. The City of Kenner in this cause permitted an amortization period of six month which could be extended an additional six months or allowed one year for any non-conforming use to recoup its investment and close at any prohibited location.

The effect of the zoning regulation is significant because existing bookstores, such as Petitioner's, which have operated for numbers of years must close and move.

C. Clarification of Test for Zoning Ordinance that Evidence is Relevant to the Problem that the City Addresses.

This Court in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) determined that it was not necessary nor did the parties have standing to construe how much inventory was necessary to be "substantial or significant" to be included within the definition of an adult bookstore subject to the zoning regulations. Not only did the parties in *Young* not have standing to challenge the vagueness of the definitions, this Court found that it was an inappropriate case to adjudicate the hypothetical claims of persons not before the Court.

This Court in *Renton* determined that the First Amendment does not require a city before enacting a zoning ordinance to conduct new studies or produce evidence independent of that already generated by other cities so long as what evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. 106 S.Ct. at 931. This is very

understandable since Renton had no existing adult theaters and any study as to the effects would have been speculative. Renton adopted an ordinance which permitted location in commercial zones and eliminated theaters in residential zones or within a specified distance from residential zones, as well as churches, parks or schools. Renton, however, was not eliminating adult movies from commercial districts, nor was it relegating them only to industrial districts. Furthermore, it did not have a long existing adult book/video store in an industrial area, albeit Special Industrial, as did Kenner.

The District Court, affirmed by the Fifth Circuit, stated that neither the Fifth Circuit, nor the Supreme Court had determined exactly what reasonable, reliable evidence entails. The District Court, however, relying upon *Thames Enterprises, Inc. v. City of St. Louis,* 851 F.2d 199 (8th Cir., 1988) found that personal observations of a legislator appeared to be sufficient. The District Court admitted that while Kenner had submitted copies of Ordinances of other cities, no facts or statistics of any sort dealing with the secondary effects of adult bookstores were submitted. Of course, no facts were submitted as to the effect of an existing adult bookstore in a Special Industrial zone.

The District Court held the language in *Renton* implies that reliance on the documented general experiences of other cities is enough. The Court further held that it was not necessary to address the effects of adult businesses on the integrity of Airline Highway where the bookstore was located.

The Court should provide some legal guidelines as to the necessary evidence of studies relevant to existing adult businesses in order to support zoning changes as drastic as established by the City of Kenner, whereby existing businesses are amortized out of existence and limited to substantially inaccessible light and heavy industrial areas or the Court should determine that no studies are now necessary on secondary effects of adult bookstores or theaters.

The Petitioner challenged the Kenner Ordinance because the City made no study and had no evidence relevant to the problem that the City addressed which was one adult book/video store in the City which had existed in a Special Industrial Zone for 15 years.

Legal standards to address the necessary studies for such an adult book/video store could also apply to the general video stores. This Court determined it need not decide and any challenge to vagueness of the meaning or "substantial or significant" portion of the inventory in the definition of an adult bookstore. Ordinances, however, have defined an adult bookstore as containing five percent (5%) or more of the stock (*Landover Books, Inc. v. Prince George's County, Maryland,* 566 A.2d 792 (Maryland 1989)) and twenty percent (20%) of stock or display space, *Christy v. City of Ann Arbor,* 824 F.2d 489 (6th Cir. 1987). If there is to be Equal Protection, the distribution of any adult material should have applicable legal standards.

General video stores which carry adult titles in separate "adults only" sections contributed an average of 13% of the income of these video stores nationwide. Certainly, if it is *undesirable* for children and the public generally to associate or be near customers of an adult book/video store then the same undesirable persons would be customers in the "adults only" section of a general video store and would be in close contact with young persons who are customers of the general video store. The State of Washington, which also produced the *Northend* decision, decided *World Wide Video, Inc. v. City of Tukwila,* 816 P.2d 18 (Wash. 1991). The Washington Court found that an Ordinance defining an adult business which had 10% or more of its stock in trade could not rely on evidence on the general effect of adult businesses compiled by others. Any study had to be relevant and specifically directed to the problem that the City addresses which was adult film rentals from stores with inventory of at least ten and one-half percent (10.5%). None of the

sources studies were of these limited businesses. The evidence was not relevant to the problem that the City addressed. Neither are ordinances of cities reviewed by Kenner relevant to the closing of an adult bookstore which had existed for fifteen (15) years in a Special Industrial Zone.

D. Combined Distance Regulation and Restrictive Zoning.

Distance requirements were approved by the Court in *Young*. There were still "myriad" locations available in the City of Detroit. In fact, there was no claim by distributors and exhibitors that adult films were denied access to the market or that the Ordinance would limit the total number of adult theaters which may operate in the City of Detroit. *See*, 96 S.Ct. at 2448.

In *Renton* there no distance requirements between adult businesses. While there was a challenge as to the amount of land available, theaters and bookstores could be in commercial as well as industrial zones. The distance requirements were limited to prohibiting an adult use within 1,000 feet of a residential zone, church, park or school. However, in permitted areas adult theaters or bookstores could be next door to each other.

Municipal ordinances adopted by Kenner and others have not only restricted First Amendment activities to light and heavy industrial zones which are not suited for retail establishments, but also adopt distance requirements between adult uses. The effect is to limit severely accessibility. The result is demonstrated in *Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102 (9th Cir. 1988). An ordinance to prevent clustering with a 1,000 foot separation requirement between any adult businesses consumes a 72-acre buffer zone surrounding each adult business. Whether there is one or many sites within a particular available area, the establishment of one adult bookstore or theater effectively eliminates 72 acres or more (depending upon its location to other prohibited zones) from availability for adult

uses. The result is the effective restraint of First Amendment activities by zoning ordinances combining the distance restrictions approved in *Renton* and *Young*. *Young* required dispersal of adult uses. *Renton* permitted concentration of adult uses within limited areas. The combination of restrictions to industrial zones and separation of uses severely limits alternative avenues of communication. This Court should clarify the legal standards to prevent the suppression of First Amendment rights.

POINT II

THE RULING OF THE FIFTH CIRCUIT THAT ANY AVAILABLE SITES FOR AN ADULT BOOKSTORE MEETS THE RENTON TEST FOR ALTERNATIVE AVENUES OF COMMUNICATION IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL

The District Court as affirmed by the Fifth Circuit held that if the City of Kenner provided *any* sites such as the industrial area specified in the Zoning Ordinance, it would meet the current test for reasonable alternative avenues of communication. The expert for the City of Kenner determined that only land north of the New Orleans Airport in the industrial areas was available. The Plaintiff's expert also admitted the availability of four possible sites north of the Airport. The distance requirements of 1,000 feet between adult uses permitted four (4) possible sites north of the Airport. The District Court also recognized that parts of Kenner were once primarily marshlands and crisscrossed with canals. Of the ten (10) streets serving the industrial areas, two (2) were through streets with bridges over the canals (*see* District Court Slip Opinion, A-21). The decisions of the Sixth, Eighth and Ninth Circuits construing the meaning of reasonable alternative avenues of communication are in conflict with the interpretation of the Fifth Circuit. In addition, state decisions of Maryland, California, and possibly Washington are

likewise in conflict with the Fifth Circuit's interpretation of reasonable alternative avenues of communication established by *Renton*.

Walnut Properties, Inc. v. City of Whittier, 861 F.2d 1102 (9th Cir. 1988) construed a zoning ordinance which permitted adult businesses in commercial and industrial zones separated from residences, churches, and other adult uses by 1,000 feet. The only existing adult theater in the central business district of Whittier would be required to close and relocate. This Court calculated the buffer zone requirement of seventy-two (72) acres caused by the 1,000 foot separation, leaving just three (3) areas in which adult businesses could be located, none of which would be in the business zone. To find there were adequate alternative avenues would make a mockery of First Amendment protections.

Christy v. City of Ann Arbor, 824 F.2d 489 (6th Cir. 1987) remanded to the District Court the determination of reasonable alternative avenues of communication when the ordinance provided the adult business could only be in a C2A Commercial Zone which severely limited available sites. The Court relied upon its pre-*Renton* decision of *CLR Corp. v. Henline*, 702 F.2d 637 (6th Cir. 1983) which limited adult businesses to B-2 Business Districts and severely restricted expression to only two (2) to four (4) restricted uses in a half mile strip of a twenty-five (25) square mile city. It rejected the theory that allowing stores to carry twenty percent (20%) adult wares would guaranty the availability of some adult materials.

Alexander v. City of Minneapolis, 928 F.2d 278 (8th Cir. 1991) held moot the bookstore appeal of Alexander who had just been convicted of RICO charges and his adult bookstores seized. However, the issue relating to the theaters owned by Alexander was still justifiable. Adult theaters could be located in B4S and B4C segments of the central business district. There could be

only one (1) adult use allowed per block face. The Court determined that there were at least one hundred twenty (120) block faces potentially available for owners of adult theaters to locate their facilities which distinguished the earlier decision of the Eighth Circuit in *Alexander v. City of Minneapolis*, 698 F.2d 936 (8th Cir. 1983). *Alexander I* was decided pre-*Renton*. There was a 500 feet prohibition from residential, churches and other facilities and from other adult only facilities. The five (5) adult only theaters in Minneapolis were all in prohibited areas and either seven (7) and possibly nine (9) of the ten (10) adult bookstores in Minneapolis were in prohibited areas. There was at most twelve (12) possible legal sites.

Renton required no separation between adult uses. Courts construing *Renton* have noted this feature in applying *Renton* to determine the availability of alternative sites. There were also no existing adult theaters in *Renton* and no indication by the Court in *Renton* that an ordinance which would have forced the only adult theater out of business with no definite prospect of a place to relocate would be constitutionally acceptable.

Decisions by state courts are also in conflict with the Fifth Circuit. *City of Stanton v. Cox*, 255 Cal. Rep. 682, 207 Cal. App. 3d 1388 (1989), permitted adult theaters in C2 Zones. Given Stanton's relatively small geographic area of 3.5 miles and the double restriction of 1,000 feet from prohibited uses plus separation of adult bookstores or arcades by 1,000 feet, severely limited the number of locations. Stanton could point only to a total of six (6) sites where regardless of availability a business could be located. That state court noted that ordinances with the requirement that adult businesses be separated by a specific distance from other adult businesses have frequently failed to pass constitutional muster if the end result leaves little opportunity for the businesses to operate. The separation requirements make so few sites available that the effect is to greatly restrict lawful speech.

The Washington Court did not address reasonable alternative avenues in *Worldwide Video v. City of Tukwila,* 816 P.2d 18 (Washington 1991), but the ordinance limited adult bookstores to only the M-2 industrial zone. Adult bookstores were those which contained ten percent (10%) or more of stock and trade. The Court found the City had no evidence of adverse secondary effects from such a restricted use and it did not need to reach the question of alternatives. *Bonnell, Inc. v. Board of Adjustment,* 791 P.2d 107 (Ok. 1989) found that 1,100 acres with forty-four (44) available individual locations met all the conditions which included 1,000 feet from other adult entertainment uses and 500 feet from church, school, park or residential use. In Kenner there were only four (4) possible sites.

Finally, *Landover Books, Inc. v. Prince George County, Maryland,* 566 A.2d 792 (Md. 1989) which construed the same ordinance as *11126 Baltimore Blvd. v. Prince George County,* 866 F.2d 1415 (4th Cir. 1989) found that the restriction to commercial and industrial areas provided reasonable alternatives when there were approximately twenty (20) commercial and industrial areas with sufficient zoned land to meet the 1,000 foot distance requirement and there were only seven (7) adult bookstores currently operating in the County.

Even the decision of *Cook County v. Renaissance Arcade,* 522 N.E.2d 73 (Ill. 1988) which was relied upon by the City of Kenner had no separation distance requirements in industrial zones for adult uses. There were seventy-eight (78) industrial areas available containing numerous sites ranging from several acres to almost one hundred (100) acres. The Illinois Court found that *Renton* was complied with even though it eliminated the commercial uses from the ordinance on the basis that there was an unconstitutional special permit requirement.

We believe that the *Renton* and *Young* decisions require that the following factors be present to meet the test for alternative areas of communication:

(1) Accessibility of area. *Renton* allowed adult uses without separation requirements in 520 acres. The Court could have found there were numerous sites available. In fact, the Brief of the City described four hundred (400) available sites.

(2) The available land should be suitable for retail trade. Although the owner of the bookstores must fend for himself in the real estate market, there still must be a market which would have land available for retail trade.

(3) The land available should be consistent with zoning principles. There should be commercial land available, although most zoning ordinances permit higher usage in lower zones, such as commercial uses in industrial zones. A retail business should be allowed in *some* commercial zones.

(4) Concentration or dispersal should be permitted but the effect of either such concentration or separation must be ascertained. When there is a combining of separation from residential, churches and other prohibited uses, together with separation from adult uses, the effect must be analyzed for the number of available reasonable alternative bookstores in the city.

(5) Finally, the locations must not be inconvenient to the public. There must be both accessibility and safety for the public to have reasonable avenues of communication. Location should not be in inconvenient industrial areas where night time use by the public might be inhibited.

POINT III

THERE IS AN APPARENT CONFLICT BETWEEN THE DECISIONS OF THE FIFTH CIRCUIT AND THE RENTON AND YOUNG DECISIONS OF THIS COURT

Petitioner asserts that the Fifth Circuit has misinterpreted and misapplied the *Young* and *Renton* decisions. Prior to *Renton*, the

Fifth Circuit in *Basiaranes v. City of Galveston*, 682 F.2d 1203 (1982) had construed zoning limiting the location of adult theaters to the industrial area which was at a distance from other consumer-oriented establishments. Few access roads led to the permitted locations which were found among warehouses, shipyards, undeveloped areas and swamps. The locations were poorly lit, barren of structures suitable for showing films and perhaps unsafe and were not reasonable alternative avenues of communication. Subsequently, in *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, the claim of the Plaintiff of only forty (40) sites available was refuted in that the potential available sites were estimated at one hundred (100) and perhaps up to tens of thousands. The forty (40) sites testified to by one expert of the plaintiff were in only twenty percent (20%) of the City of Houston studied.

Likewise, the zoning portion of *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298, was not before this Court. Ample alternative sites were found. The Dallas plan permitted locations in several areas stretching from the inner-City area to the north and south suburbs accessed by such major thoroughfares as Interstate 35, Interstate 30, Loop 12, Highway 183, and Harry Hines Boulevard. Eight to ten percent (8-10%) of the City's total area — 21,000 acres — was available. There was also a three (3) year amortization provision.

The Fifth Circuit released on January 9, 1992 (the same day this cause was argued in the Fifth Circuit) the decision of *Woodall v. City of El Paso*, 950 F.2d 255. The jury issue was alternative avenues of communication. The case was reversed because of an improper instruction on this test, and remanded to the District Court.

However, the Fifth Circuit interpretation of *Renton*, that making available any site is sufficient, is evident in this decision. The jury had found that there were thirty-nine (39) adult busi-

nesses operated in El Paso and the ordinance allowed fifty-nine (59) adult business sites on 1,165 acres. The Court did not determine this violated *Renton,* but merely remanded the case to the District Court for retrial because of improper jury instruction. The Fifth Circuit held that land can be unsuitable for conducting an adult business if its physical, legal or economic character prohibits its use by any such business. Land is only economically unsuitable if no adult business could possibly expect to profit by opening there.

The El Paso ordinance had distance requirements of 1,000 feet from churches, parks, schools, residences and from other adult uses. The Fifth Circuit completely ignored the necessary seventy-two (72) acre buffer zone. The sole instruction that the Fifth Circuit required the District Court to give on remand was that the jury should be told that "land cannot be found to be reasonably available if its physical or legal characteristics make it impossible for any adult business to locate there." 950 F.2d at 263.

The Court noted that locations with outstanding long term leases or on which there were sewer treatment plants or other areas such as ponding would be unavailable because of the land's legal characteristics.

The jury had found that approximately 565 acres of *desert* land that did not have roads, utilities and structures, qualifies as reasonable alternative avenues of communication. The Fifth Circuit did not rule that such areas should be disregarded, but merely remanded the case for a jury to determine reasonable alternative areas. The Fifth Circuit has misinterpreted and misapplied *Renton* and *Young* by adopting as *current test* that *any sites* which are physically or legally available meet the test of providing ample alternative avenues of communication.

POINT IV

THE DECISION OF THE FIFTH CIRCUIT IS IN APPARENT CONFLICT WITH THE LEGAL STANDARDS TO DETERMINE WHETHER THE REGULATION IS NARROWLY TAILORED

This Court in *Ward v. Rock Against Racism*, __ U.S. __, 109 S.Ct. 2746 (1989) determined that narrowly tailored need not be the least restrictive or least intrusive. However, it must not burden substantially more speech than is necessary to further the Government's legitimate interest. The Fifth Circuit misapplied this rule in that the Ordinance of the City of Kenner was directed to the purpose of protecting the City's neighborhood and commercial districts. However, the Ordinance adopted was to close any adult book/video store in a Special Industrial Zone, which affected the Petitioner. The bookstore of Petitioner had been operating since October 1974 or for fifteen (15) years prior to the passage of this Ordinance. The Court should remand for reconsideration in light of the decisions interpreting whether the regulation is narrowly tailored.

POINT V

THE STANDARD FOR DETERMINING WHAT EVIDENCE IS RELEVANT TO THE PROBLEM THE CITY ADDRESSES SHOULD BE ESTABLISHED

The District Court held that the Fifth Circuit and the Supreme Court had not determined exactly what reasonably reliable evidence entailed. Slip Opinion, A-14. The Fifth Circuit affirmed the decision of the District Court, which assumed that a reasonable inference of deleterious secondary effects may be drawn from the material Kenner received. The entire record was stipulated. The ordinances and a synopsis of the conclusions and experiences of other cities was all that Kenner had. The accompanying legislative history of the ordinances was used by the Court to draw a reasonable inference of secondary effects.

However, none of the evidence was relevant to the problem which the City of Kenner addressed. The problem in the City of Kenner was that on U.S. Highway 61 (Airline Blvd.) there had existed an adult bookstore for 15 years in a Special Industrial zone. The bookstore was within 1,000 feet of a residence. The area surrounding the bookstore had substantial additional light and heavy industrial land as well as commercial areas. The District Court found it unnecessary to address the effects of adult businesses on Airline Highway; that is, the Special Industrial area in which the bookstore existed.

There is a trend to liberally construe *Renton* in favor of cities. For example, in *Bonnell, Inc. v. Board of Adjustment,* 791 P.2d 107 (Ok. 1989) an assistant municipal counselor who read and studied numerous ordinances and reports on the regulations of adult entertainment uses, as well as the detailed findings of the United States Supreme Court in the *Young* decision, satisfied any evidence needed to enact a zoning ordinance.

Either this Court should reaffirm that there is a need for the City legislative body to actually review and make determinations of the secondary effects based upon studies of the City, or studies conducted by other cities which are relevant to the problem that the City addresses or else the Court should abandon the need for studies for zoning ordinances affecting the First Amendment altogether. If studies are to be required, then the Court should determine that they should be relevant to the particular city. Whether there are no existing adult uses or whether there are one or many adult uses within a city should be pertinent to the study needed. Likewise, the location of existing adult uses and the effect upon the neighborhood should be studied, including if the existing adult bookstore is along a major highway zoned Special Industrial.

CONCLUSION

The interpretation of First Amendment rights as affected by zoning regulations appears to have resulted in conflicting decisions within the Circuits. This Court should accept this case for review to establish appropriate legal standards to determine reasonable alternative avenues of communication for zoning regulations affecting the distribution of material protected by the First Amendment.

Respectfully submitted,

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Counsel of Record

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3289

LAGRANGE TRADING COMPANY,
d/b/a Airline Bookstore,
Plaintiff-Appellant,
Cross-Appellee,

versus

NICKY NICOLOSI, ET AL.,
Defendants-Appellees,
Cross-Appellants.

Appeals From the United States District Court
for the Eastern District of Louisiana

(CA-90-2306-J9(1))

(January 13, 1992)

Before REAVLEY, HIGGINBOTHAM, and DeMOSS, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 47.6.

APPENDIX B

EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 90-2306

SECTION "J" (1)

LAGRANGE TRADING COMPANY,
D/B/A AIRLINE BOOKSTORE

VERSUS

NICKY NICOLOSI, AARON BROUSSARD,
and the CITY OF KENNER, LOUISIANA

JUDGMENT

(Filed: March 20, 1991)

Considering the Court's opinion in this matter,

IT IS HEREBY ADJUDGED, ORDERED AND DECREED that there be judgment against the plaintiff, LaGrange Trading Company, and in favor of defendants, Nicky Nicolosi, Aaron Broussard and the City of Kenner, dismissing on the merits plaintiff's complaint at its costs.

New Orleans, Louisiana, this 19th day of March, 1991.

/s/ Patrick E. Carr
United States District Judge

EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 90-2306

SECTION "J" (1)

LAGRANGE TRADING COMPANY,
D/B/A AIRLINE BOOKSTORE

VERSUS

NICKY NICOLOSI, AARON BROUSSARD,
and the CITY OF KENNER, LOUISIANA

OPINION

(Filed: March 20, 1991)

CARR, J.

The parties have submitted this civil action to the Court on a joint stipulation in lieu of a trial. Under Fed. R. Civ. P. 52(a), the Court now makes the following findings of fact and conclusions of law.

I

This action arises out of the City of Kenner's enactment of a zoning regulation that would force the plaintiff adult bookstore to relocate to a less desirable industrial zone. Kenner based the zoning regulation on similar ordinances enacted in other municipalities. The plaintiff, Lagrange Trading Company, operating as Airline Bookstore, has challenged the ordinance on Constitutional grounds and seeks injunctive and declaratory relief[1]

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[1] Lagrange also sought attorney's fees. That issue was severed from this action by the Court's Minute Entry of August 30, 1990.

A.

Kenner, Louisiana, is a suburb of New Orleans, with a population of approximately 80,000. In encompasses an area of approximately 15 square miles.

Lagrange Trading Company is a corporation authorized to do business in Louisiana. It leases property and operates the Airline Bookstore located at 1824 Airline Highway, Kenner, Louisiana. From June 1, 1985 through May 31, 1990, the property was leased pursuant to a five year written lease. Since May 1990, the lease has been on a month-to-month basis. An adult bookstore and arcade has operated at 1824 Airline Highway in Kenner since October 1974. Airline Bookstore is the only adult bookstore in Kenner. The Airline Bookstore rents and sells videos, tapes and films and sells magazines and books portraying sexual activity as defined in the zoning regulations. The material is available to adults only.

Airline Bookstore is located in a "special industrial" zone. The location remained special industrial when Comprehensive Zoning Ordinance No. 2427 was adopted in 1978. However at that time it became a non-conforming use as that term is defined in the ordinance.[2] Kenner adopted ordinance No. 6333 on October 19, 1989.[3] The ordinance provides zoning regulations

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[2] Stipulation of Facts paragraph 9.

[3] Kenner Zoning Ordinance 6333 provides, in pertinent part;

SECTION II: That Article III, Definitions, Section 3.02, Definitions, be and the same is hereby amended by the addition of a new sub-section designated as Sub-Section 1A to read as follows:

1A. Adult Book/Video store. An Establishment having as a substantial or significant portion of its stock in trade, books, magazines, periodicals or video tapes which are distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual

(Footnote 3 continued on next page)

for adult book/video stores and massage parlors. The ordinance would force Airline Bookstore to move to an area zoned industrial and obtain city council approval.

(Footnote 3 continued)

activities such as human genitalia in a state of sexual stimulation or arousal, acts of human masturbation, sexual intercourse or sodomy, fondling or other erotic touching of human genitals, pubic region, buttock or female breast or relating to anatomical areas such as less than completely and opaquely covered human genitals, pubic region, buttock or female breast below a point immediately above the top of the areola or human genitals in a discernable turgid state, even if completely or opaquely covered.

. . .

SECTION V. That Article XV, Light Industrial District, Section 15.02, permitted uses be amended by adding thereto a new sub-section designated as Sub-Section 1A to read as follows:

1A. Adult book/video stores and massage parlors only when located a minimum of one thousand (1,000) feet from any residence, church, school, nursery, day care center, or recreational facility or other adult book/video store or massage parlor, as measured from the closest property lines and only upon approval by the City Council per Section 23.02.

SECTION VI. That Article XVI, Heavy Industrial District. Section 16.02, Permitted Uses, be amended by adding thereto a new sub-section designated as Sub-Action 1A to read as follows:

1A. Adult book/video stores and massage parlors only when located a minimum of one thousand (1,000) feet from any residence, church, school, nursery, day care center, or recreational facility or other adult book/video store or massage parlor, as measured from the closest property lines and only upon approval by the City Council per Section 23.02.

SECTION VIII: That Article XV, L-I, Light Industrial District, Section 15.02, Permitted Uses, Sub-Section 66, be amended to read as follows:

66. Signs as permitted in the C-2 District except adult book/video stores and massage parlors which are not allowed to have descriptive art or

(Footnote 3 continued on next page)

Kenner Zoning Ordinance 6333 contains a provision for amortization of an existing book/video store.[4] While this action initially sought a preliminary injunction from the amortization provision, Kenner decided not to enforce the provision pending the outcome of this litigation.

B.

Jurisdiction is conferred on plaintiff pursuant to 28 U.S.C. § 1343. Declaratory relief is allowed pursuant to 28 U.S.C. § 2201.

(Footnote 3 continued)

photographic signs depicting any activity related to or inferring, the nature of the business, as defined in Article III, Section 3.02, Sub-Section 1A; such businesses may have signs that contain alphanumeric copy only.

SECTION VIII: That Article XVI, Heavy Industrial District, Section 16.02, Permitted Uses, Sub-Section 38, be, and the same is hereby amended to read as follows:

66. Signs as permitted in the C-2 District except adult book/video stores and massage parlors which are not allowed to have descriptive art or photographic signs depicting any activity related to or inferring, the nature of the business, as defined in Article III, Section 3.02, Sub-Section 1A; such businesses may have signs that contain alphanumeric copy only.

SECTION IX. That Article XX - Planned Unit developments, Section 20.08, Sub-Section A., Purpose of Provisions, be amended by adding thereto a new part designated as Part 5 to read as follows:

5. Adult book/video stores and massage parlors are not permitted uses under the provisions of this section.

SECTION X. That adult book/video stores or massage parlors that are made illegal by this ordinance have a six (6) month period to conform with the provisions of the ordinance or to amortize themselves out of business. In the event these illegal stores are still in violation after the initial six (6) month period, they have an additional six (6) months non-discretionary period to amortize themselves out of business or relocate.

[4]The ordinance originally contemplated a six month amortization period. Kenner extended the time to one year.

C.

Kenner challenges Lagrange's standing to bring this action. In the Stipulation of Facts, Kenner agreed that LaGrange Trading Company leased the property and operated the bookstore.[5] Kenner now argues that because Lagrange cannot prove by bill of sale for the ownership of the business or a management contract to manage the business, that there is no showing or actual injury, and hence, no standing.

The Fifth Circuit has repeatedly recognized standing in other zoning challenges as long as there is an actual or threatened injury, the injury can be traced to the defendant's challenged action which is putatively illegal and that injury will likely be redressed by a favorable decision. *F/W PBS, Inc. v. City of Dallas,* 837 F.2d 1298 (5th Cir. 1988), *aff'd in part, rev'd in part* and *vacated in part,* __ U.S. __, 110 S. Ct. 596 (1990). LaGrange derives income from the lease and operation of the bookstore, hence, it would suffer a real injury if the bookstore were forced to close or move to a less desirable location. This injury can be traced to the ordinance, which is challenged as unconstitutional. If the ordinance is struck down, then the injury to plaintiffs will not occur. Thus, LaGrange has standing to challenge the ordinance.

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[5] Fed. R. Civ. P. Rule 16, encourages stipulations between the parties and obviously intends for them to be binding. "A party is bound by what he stipulates." *Morelock v. NCR Corp.,* 586 F.2d 1096, 1107 (6th Cir.), *cert. denied,* 441 U.S. 906 (1978).

In Louisiana a lease is a synallagmatic contract by which one party gives to the other the enjoyment of a thing at a fixed price. "A lease is defined as a contract by which one party, lessor, transfers to another, lessee, the right to possession, use and enjoyment of land, buildings, etc., for a definite period of time." *Wilson Warehouse Company of Texas v. Maryland Casualty Co.,* 269 So. 2d 562 (La. 1972).

D.

In addition to the City of Kenner, LaGrange also named as defendants, in their official capacities, Nicky Nicolosi and Aaron Broussard. Nicolosi is the chief of the Inspection and Code Enforcement Department of the City of Kenner and Aaron Broussard is the Mayor of Kenner.

The intent of courts and legislatures in fostering legislative immunity is to not hinder the individual legislator's "willingness to execute his office with the decisiveness and the judgment required by the public good." *Minton v. St. Bernard Parish School Bd.*, 803 F.2d 129, 134 (5th Cir. 1986) (*quoting Scheuer v. Rhodes*, 416 U.S. 232, 239-40, 94 S. Ct. 1683, 1688 (1974)).

If individual legislators were subject to personal damages for a purely legislative act then they would be reluctant to act. However, in the instant action this rationale does not apply because Nicolosi and Broussard have been sued in their official capacity only, and can not be held personally liable. Additionally, the relief sought is primarily injunctive in nature.

The doctrine of legislative immunity does not bar suits in which officials are sued in their official capacity only, or are sued for injunctive relief. *Id.* at 134. Thus, the doctrine of legislative immunity does not prevent Nicolosi and Broussard from remaining in this action as named defendants.

II.

A municipality has the police power authority to zone its land in the manner considered best to serve the municipality's particular interests. *Village of Euclid v. Ambler Reality Co.*, 272 U.S. 365, 47 S. Ct. 114 (1926). A municipality's exercise of its police powers is valid as long as the municipality can show a valid governmental interest requiring the exercise of such powers. *Village of Belle Terre v. Borras*, 416 U.S. 1, 94 S. Ct. 1536 (1976). Most zoning acts permit zoning for the purpose of

promoting the health, safety, morals, or general welfare of the community that enacted them. However, when fundamental constitutional rights are involved, the traditional judicial deference to zoning ordinances does not apply. *Moore v. City of East Cleveland,* 431 U.S. 494, 504, 97 S. Ct. 1932, 1938 (1977).

The fundamental right of free speech to all is imbedded in the First Amendment of the Constitution. Speech may not be regulated by the government unless a valid content-neutral restriction is utilized. If a restriction is content based, then its review requires strict scrutiny — a compelling government interest that cannot be satisfied through less restrictive means. *Police Dep't of Chicago v. Mosely,* 408 U.S. 92, 102, 92 S. Ct. 2286, 2293 (1972). If the restriction on speech is non-content based, it can only regulate time, place and manner. *Young v. American Mini Theaters,* 427 U.S. 50, 96 S. Ct. 2440 (1976).

The most frequent starting point of this analysis starts with the view that the party challenging the ordinance has his claim rooted in the first amendment. The court must first determine the predominant purpose of the ordinance before assessing its validity as a content neutral time, place and manner regulation. The burden then falls on the government to overcome a presumption of invalidity and show that a valid time, place and manner restriction is present. *City of Renton v. Playtime Theaters, Inc.,* 471 U.S. 41, 106 S. Ct. 925 (1986).

A. Kenner's stated purpose of the ordinance.

In *Renton* the Court first looked to the predominant intent of the ordinance and stated that an "otherwise constitutional statute would not be struck down on the basis of an alleged illicit legislative motive." *Renton,* 106 S. Ct. at 929 (*quoting United States v. O'Brien,* 391 U.S. 367, 382-386, 88 S. Ct. 1673, 1681 (1968)).

However, if the motive of the city is not to control adverse secondary effects of adult businesses, then the ordinance should

be viewed as a restraint on free speech. *SDJ, Inc. v. City of Houston,* 837 F.2d 1268, 1273 (5th Cir. 1988).

Kenner asserts that its primary intent is to regulate the secondary effects of adult book stores. The stated purpose of Kenner Zoning Ordinance 6333 is as follows:

> SECTION I:
>
> . . . .
>
> The zoning regulations and districts as herein set forth have been made in accordance with a comprehensive plan for the purpose of promoting the public health, safety, morals, conveniences, order, prosperity, and general welfare of the community. They have been designed to lessen congestion in the public streets, to secure safety from fire, panic and other dangers, to provide adequate air and light, to prevent the overcrowding of land, to avoid undue concentration of population, and to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. They have been made with reasonable consideration, among other things, as to the character of each district and its particular suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the city.
>
> Furthermore, these zoning regulations govern the establishment of adult use businesses to serve a valid governmental interest. They recognize that such businesses would have a severe impact upon surrounding businesses and residences. The regulations by their terms are designed to prevent crime, protect the City's retail trade, maintain property values and generally protect the quality of the City's neighborhoods, commercial districts, and the quality of urban life, but not to suppress the expression of unpopular views.

Plaintiffs herein argue that Kenner's stated intent, to secure neighborhoods and retail businesses, is inapposite to the ordinance's effect of excluding an adult business from a site that is zoned special industrial. However, the adult business is within 1000 feet of a residence and a residential area. Thus, relocation of the business does fit in with Kenner's stated purpose.

Kenner has submitted the minutes from its city council meetings and correspondence between the city, its planning department and its attorneys.[6] A reading of these leads to the conclusion that although Kenner was actively seeking a way to enact the most vigorous zoning ordinance possible, it did not want to infringe on constitutional rights.

The court in *Dumas v. City of Dallas,*[7] noted that "divining the intent of a legislative body is inherently problematic."[8] The district court in *Dumas* found it to be of no moment that the public speakers in favor of the ordinance supported it almost singularly in hopes it would suppress the speech purveyed by sexually oriented businesses. Likewise, in the instant situation one Kenner politician voiced his opinion in favor of suppressing adult businesses.[9] However, this is the voice of just one councilman. *Renton* makes it clear that one opinion cannot be relied upon for the voice of government. *Renton,* 106 S. Ct. at 929.

The ordinance states it is directed at reducing the secondary effects of adult businesses. It does not provide a blanket

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[6] Exhibit 3, pp. 7-95, Exhibit 4. However, the *Renton* Court found that the stated intent of a politician could not be relied upon as the intent of the city.

[7] 648 F.Supp. 1061 (N.D. Tex. 1986), *aff'd sub nom. FW/PBS v. City of Dallas,* 837 F.2d 1298 (5th Cir. 1988), *Aff'md in part* and *rev'd in part* and *vacated in part,* 110 S. Ct. 596 (1990).

[8] *Dumas,* 648 F.Supp. at 1064.

[9] Councilman Baroni's statement on the issue can be found in the public hearing minutes, Exhibit 8.

prohibition on all adult businesses, but attempts to circumscribe their choice of location. In *Renton* the Court quoted Justice Powell's opinion in *Young v. American Mini Theaters,*[10] "[I]f [the city] had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice of location." 106 S. Ct. at 929 (citations omitted).

The same reasoning found in *Renton* can be applied to Kenner. Thus, Kenner's intent meets the relaxed test for intent currently utilized by the Supreme Court and the ordinance should be analyzed as a valid time, place, or manner restriction.

B. Time, place and manner restrictions.

Because the Kenner ordinance was enacted with a valid motive, and is content neutral, it is appropriate to analyze it as a time, place and manner restriction. The inquiry becomes whether the ordinance was designed to serve a substantial government interest unrelated to the content of speech, is narrowly tailored to achieve that interest and whether or not it unreasonably limits alternative avenues of communication.

1. Substantial government interest

To establish a substantial governmental interest, it is necessary only that Kenner demonstrate that the evidence which it relied upon "is reasonably believed to be relevant to the problem that the city addresses." *Renton,* 106 S. Ct. at 931. It is not a matter of dispute that Kenner's preservation of its neighborhoods is a valid governmental concern. *Young v. American Mini Theaters,* 427 U.S. 50, 96 S. Ct. 2440, 2453 (1976). Plaintiff argues that the city council did not have sufficient factual support of the secondary effects of adult businesses on Kenner's neighborhoods to substantiate the passage of the ordinance.

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[10] 427 U.S. 50, 96 S. Ct. 2440 (1970).

Kenner alleges that it relied on studies from other cities to determine the negative secondary impact of adult bookstores. In doing so, Kenner relies on language from *City of Renton v. Playtime Theaters Inc.*,

> We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the "detailed findings" summarized in the Washington Supreme Court's *Northend Cinema* opinion, in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

106 S. Ct. at 931.

Northend Cinema Inc. v. Seattle[11] concerned adult theaters in Seattle. The evidence produced in *Northend* contained several studies of the impact of adult businesses on the surrounding area, including studies unique to Seattle. Renton is a suburb of Seattle, and enacted its ordinance with the Washington Supreme Court's opinion in front of it. The Supreme Court held that Renton's reliance on Seattle's experiences was sufficient.

The Fifth Circuit, however, requires a city to establish reliance on some evidence of substantial interest. Legitimate interest "may be shown by reasonable inferences from specific testimony of individuals, local studies, or the experiences of other cities. This level of scrutiny best accommodates the need to ensure proper purposes with the limited competence of courts to discern ephemeral legislative motive." *SDJ v. City of Houston*, 837 F.2d at 1268. In *SDJ* the Fifth Circuit found that a legitimate substantial purpose existed. The city had formed committees,

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[11] 90 Wash. 2d 709, 585 P.2d 1153 (1978).

consulted experts, held hearings and consulted studies from other cities. *Id.* at 1275.

Kenner states that it relied on "documented experiences and conclusions of Huntington, West Virginia, Salt Lake City, Utah, Little Rock, Arkansas, and Boston, Massachusetts." Kenner has submitted copies of the ordinances from the listed cities. No facts or statistics of any sort dealing with the secondary effects of adult bookstores were submitted. However, the language in *Renton* implies that reliance on the documented experiences of other cities is enough.

In *Renton* the city did offer evidence of studies that were relative to the effects of adult businesses in other areas. This court on the other hand does not have evidence of any studies relied upon by Kenner, but does have submitted zoning reports which contain synopsis of the conclusions and experiences of other cities. While the Fifth Circuit will not allow merely conclusory statements as to the deleterious effects of adult businesses to pass the *Renton* standard,[12] here Kenner has submitted not only the ordinances from other cities, but also the accompanying legislative history of each ordinance from which a reasonable inference of secondary effects may be drawn.

Neither the Fifth Circuit nor the Supreme Court have determined exactly what "reasonably reliable evidence" entails. In recent Fifth Circuit cases such as *SDJ v. City of Houston* and *FW/PBS v. City of Dallas*, the Fifth Circuit did not have the opportunity to elaborate on this issue as both cities presented evidence of reliance on documented secondary effects studies. However, the Eighth Circuit was presented a situation where the president of the Board of Aldermen of St. Louis at the time a zoning ordinance was enacted, testified that the board patterned the bill after the Detroit ordinance upheld in *Young*. *Thames Enter-*

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[12] *SDJ v. City of Houston*, 837 F.2d at 1273.

prises, Inc. v. City of St. Louis, 851 F.2d 199 (8th Cir. 1988), *reh'g denied* (Aug. 19, 1988).

The witness further testified that at the time the ordinance was considered he did not recall introducing any studies regarding the effects of adult entertainment businesses on neighborhoods. Nor did he recall the Board compiling or considering any other empirical data regarding these effects. The Board relied on the personal observation that adult businesses were not conductive to a "stable, growing, vibrant neighborhood." *Id.* at 200. The Eighth Circuit held that the "personal observations and judgments of a legislator, together with the results of research of other sources, can have substantial weight. [these observations] fall into the category of experiences that can properly be considered by a legislative body in enacting an ordinance. *Id.* at 202.

In light of recent decisions, of both the Supreme Court and other circuits, it seems rational to assume that a "reasonable inference" of deleterious secondary effects may be drawn from the material Kenner received from other cities.

Because Kenner's first stated intent of avoiding the secondary effects of adult businesses is sufficient, it is not necessary to address the effects of adult businesses on the integrity of Airline Highway.

2. Tailoring

With respect to the requirement of narrow tailoring, the Supreme Court has held that "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation," the requirement is satisfied. *Ward v. Rock Against Racism,* 491 U.S. 781, 109 S. Ct. 2746, 2758 (1989). The Court further explained that as long as "the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the

government's interest could be adequately served by some less-speech restrictive alternative." *Id.*

Ordinance 6333 does serve Kenner's interest in protecting neighborhood from the secondary effects of adult bookstores. Thus, even though a less restrictive means might be conceivable, Kenner's ordinance is not substantially broader than necessary.

3. Alternative avenues of communication

The first amendment requires that the public have open access to information and that the government impose no restrictions which cut off the public's reasonable access. The government may only impose restriction on the free flow of information to the extent that the public maintains reasonable access to the expression. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S. Ct. 1817 (1976).

Thus, the second question to be asked in a time, place, manner restriction analysis is whether the ordinance unreasonably limits alternative avenues of communication. This test can be construed as asking whether or not the ordinance allows the business a reasonable alternative to operate in the city.

The Kenner ordinance provides that adult book/video stores and massage parlors may only locate in light industrial and heavy industrial districts. Further restrictions applicable to both industrial districts provide:

> 1A. Adult book/video stores and massage parlors only when located a minimum of one thousand (1000) feet from any residence, church, school, nursery, day care center, or recreational facility or other adult book/video store or massage parlor, as measured from the closest property lines and only upon approval by the City Council per section 23.02.

Plaintiffs argue that the ordinance limits alternative avenues of communication in three ways; 1) the limitation to light or

heavy industrial zones, 2) the 1000 foot distancing requirement limits the area even within the permitted zones, and 3) the prior approval requirement grants too much discretion to the city.

a. The restriction to light and heavy industrial zones and the dispersement requirement

Kenner modeled its ordinance on the one enacted by Cook County, Illinois. Kenner relies on the Illinois Supreme Court's decision in *Cook County v. Renaissance Arcade,*[13] which upheld the principal portions of the Cook County ordinance. However, there are differences between the two ordinances.

The Cook County ordinance allowed adult uses in all 78 industrial areas in unincorporated Cook County *without* a special permit and *with no further restrictions*. This accounted for 5.7% of the total land in unincorporated Cook County. The ordinance also allowed adult uses in the 245 commercially zoned areas of unincorporated Cook County, but required a special permit and did not allow more than 2 adult uses within 1000 feet of each other. 522 N.E. at 79.

The Illinois Supreme Court found that the quality and quantity of available sites in the industrial zones was ample. The available tract sizes ranged from several acres to almost 100 acres.[14]

In *Renton* the ordinance limited adult businesses to 5% of the available land. However, the ordinance did not limit what zones adult businesses could operate in. Adult businesses were free to operate in any zone, except residential, as long as the location was 1000 feet from any residential zone, single or multiple family dwelling, church, park or school.

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[13] 122 Ill.2d 123, 522 N.E.2d 73 (1988).

[14] *Cook County v. Renaissance Arcade*, 522 N.E.2d at 79.

The Court found that the ordinance left 520 acres open for the establishment of an adult theater. The Supreme Court rejected the plaintiff's argument that there were no commercially viable sites in the available area.[15] Within the five percent of the land not zoned out of availability, a majority of sites were either already occupied, not for sale, or otherwise unsuitable for an adult movie business. But the Court reasoned that as long as "some" land is physically not restrictively zoned, no matter how minimal, that land is available as a potential operating site for adult entertainment.[16] The Court held "that respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a first amendment violation." *Renton,* 106 S. Ct. at 932.

In *SDJ, Inc. v. City of Houston,*[17] only 40 sites were left open for the establishment of adult businesses. Plaintiffs argued that many of these were unavailable or unsuitable for commercial uses. The Fifth Circuit found that this was adequate under *Renton. SDJ* at 1276-77.

Likewise the Sixth Circuit in *S & G News v. City of Southgate,*[18] approved an ordinance that allowed for proportionately less than

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[15] Some of the sites that fell within Renton's zoning limits were already occupied, and "practically none" of the undeveloped sites were for sale or lease. *Id.* at 932. While LaGrange is concerned with the availability of the permitted sites, its major objection is to the commercial viability of the sites.

[16] *Playtime Theaters v. City of Renton,* 748 F.2d 528 (9th Cir. 1984). The appellate court did not dispute that 520 acres were outside of the restricted zone. The court did note that a substantial part of the available land was occupied by: "(1) a sewage disposal site and treatment plant; (2) a horsetrack and environs; (3) a business part containing buildings suitable only for industrial use; (4) a warehouse and manufacturing facilities; (5) a Mobil Oil tank farm; and, (6) a fully developed shopping center. *Id.* at 534.

[17] 837 F.2d 1268 (5th Cir. 1988).

[18] 638 F.Supp. 1060 (E.D. Mich. 1986), *aff'd,* 819 F.2d 1142 (6th Cir. 1987).

one-half of the geographically available land than was allowed in *Renton*. Southgate, a community of 30,647, enacted a restrictive two-part zoning ordinance similar to Kenner's where the zone was restricted and then a distance requirement was imposed. Southgate's particular zoning ordinance initially excluded adult businesses from 97.77 percent of the town by only allowing them in C-3 zones.[19] Within a 2.23 percent area where adult businesses were allowed, a further 1,000 foot distance requirement was imposed. *Id.* at 1064. In interpreting *Renton*, the Sixth Circuit held that Southgate's ordinance was valid because it allowed reasonable geographic operating sites.

In *Walnut Properties, Inc. v. City of Whittier*,[20] the only adult theater in Whittier challenged a zoning ordinance that would force them to relocate. Whittier's ordinance purported to disperse adult businesses by limiting their proximity with a 1,000 foot separation provision. The court made the computation that the 1,000 foot provision requires a buffer zone of 72 acres. With this in mind, the Ninth Circuit felt it was meaningless to look at the total number of acres available, instead looking at the dispersal of sites throughout the city. The court cited the Fifth Circuit's pre-*Renton* decision in *Basiardanes v. City of Galveston*,[21] for the assertion that merely mimicking a valid ordinance is not enough. *Walnut*, 861 F.2d at 1109.

In *Basiardanes* Galveston's ordinance categorically banned adult businesses from all but ten to fifteen percent of the city. Within the ten to fifteen percent area adult businesses could only operate when 1000 feet from another adult business or "church, school, park or recreational facility where minors congregate,"

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[19] Of the 4,400 acres of land comprising Southgate, only 109 were zoned C-3. 638 F.Supp. at 1064.

[20] 861 F.2d 1102 (9th Cir. 1988), *cert. denied*, 409 U.S. 1006, 109 S. Ct. 1641 (1989).

[21] 682 F.2d 1203 (5th Cir. Aug. 19, 1982).

and 500 feet from any residential zone or from any two, or combination of two, "pool halls, liquor stores or bars." *Basiardanes*, 682 F.2d at 1209.

The Fifth Circuit, in striking the Galveston ordinance as a restraint on free speech, found that these requirements together served to exclude adult businesses from 80-90% of the areas from which they were not flatly banned. The remaining locations, located in light and heavy industrial areas, were unsuitable for a retail business. *Id.* at 1209. However, it is important to note that *Basiardanes* was a pre-*Renton* decision. Given the Supreme Court's affirmation of the appellate court in *Renton*,[22] it seems unlikely that today's Court would reach the same conclusion as to Galveston's ordinance.

Kenner's ordinance restricts the bookstore to relocating in light or heavy industrial areas. The 1000 foot dispersal requirements further limits viable areas. Both parties have submitted expert's reports on the availability of sites. While the experts both agree on the locations available, they disagree on the feasibility of the sites.

889.27 acres are available in areas zones light or heavy industrial.[23] Three and nine-tenths (3.9) acres of developed industrial land and approximately one and a half (1.5) acres of undeveloped land in Kenner have been identified as meeting both the industrial zone and distance requirements. The land south of the airport is not available at this time, but several parcels of it could eventually be available for use.[24] Plaintiff's expert admits to the availability of four possible sites north of the

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[22] *See supra*, note 22.

[23] Exhibit 3, p. 76.

[24] Exhibit 15, statement of Albert Eason.

airport. Of the ten streets servicing this area, two are through streets with bridges over the canals.[25]

Plaintiff argues that the available sites are unsuited for a retail establishment. Kenner argues that patrons of adult businesses will go where the businesses are located. One fact that distinguishes the instant case from the cases cited above is that Kenner has no apparent central business district. Retail establishments are scattered throughout the city limits. Thus, that the available sites are not in a visible area does not carry the import that it did in cases such as *Basiardanes*, where a definable business district existed.

In *Renton* the Court held that the first amendment is not concerned with the economic or commercial viability of adult businesses.[26] The majority of the Court reasoned that the first amendment does not compel the government to assure access. Hence, that the Kenner ordinance allows plaintiffs any available sites seems to meet the current test for alternative avenues of communication.

b. The permit requirement

Kenner Zoning Ordinance article 15 § 15.02 mandates that an adult book/video store must apply for approval by the city

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[25] Exhibit 3, Affidavit of Michael Truax. For those unfamiliar with the Kenner area it was once primarily marshlands. Through the advent of drainage facilities and pumping stations, it has been turned into developed land. However, it is criss-crossed with drainage canals, particularly in the western portion, which borders the remaining bayous.

[26] 106 S. Ct. at 932.

council according to § 23.02.[27] Under this provision such application is made to the City Planning and Zoning Commission which then will hold a public hearing on the application. Under La. Rev. Stat. Ann. 33:113, the Planning Commission has sixty days within which to approve or disapprove the application; otherwise the application shall be deemed to have been approved

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[27] SECTION 23.02 provides in pertinent part:

No amendment shall become effective until:

A. There shall have been a public hearing held in relation thereto before the City Planning and Zoning Commission, at which time interested citizens and parties shall have had an opportunity to be fully heard.

B. All requests requiring a hearing before the City Planning and Zoning Commission other than zoning change proposals, Hazardous Obnoxious Uses, Planned Unit Developments and Child Care Centers shall be recommended by the City Planning and Zoning Commission and authorized by the City Council only when said use complies with all of the following provisions:

1. Said use is necessary to promote the public interest at that location.

2. Said use is compatible with adjacent or nearby land uses and zoning in the area.

3. Said use will not cause substantial injury to other property in the neighborhood in which it is to be located.

4. Said use is designed, located and proposed to be operated so that the public health, safety and welfare will be protected.

5. Said use has adequate ingress and egress to property and proposed structures thereon with particular attention to vehicular and pedestrian safety and convenience, traffic flow and control, and access in case of fire.

The Court notes that this is in addition to the licensing requirement of the Finance Code, which presumably is handled by the finance department. Because the applicability of this provision has not been raised by the parties, it is not factored into the court's decision.

and a certificate to that effect shall be issued by the commission on demand. Alternatively, a report from the Planning and Zoning Commission must be submitted to the City Clerk within thirty days after the date of the public hearing. If not submitted, the report shall be deemed favorable. Section 23.02 C. Thereafter, the City Council has ninety days to vote on the report.

Kenner relies on *FW/PBS v. City of Dallas*,[28] for the proposition that these procedural safeguards are adequate. In *FW/PBS* the Court struck down a permit requirement scheme because it did not have adequate procedural safeguards. The Court pointed out the city's failure to specify a time within which the license would be granted. *Id.* at 605. Kenner argues that because it does not provide a time limitation on the approval or disapproval of a permit it is constitutional.

However, this was just one of two evils that the Court held would not be tolerated in a licensing scheme. The Court's other concern was that a prior permit scheme might place "unbridled discretion in the hands of a government official or agency." *Id.* at 604-05. (Citations omitted).

In light of its decision in *FW/PBS* the Supreme Court recently vacated and remanded a Fourth Circuit case that had approved a city's prior approval scheme for non-conforming uses. *11126 Baltimore Blvd., Inc. v. Prince George's County*, 886 F.2d 1415 (4th Cir. 1989), *vacated* and *remanded*, 58 U.S.L.W. 3768 (U.S. June 6, 1990).[29] Because the Supreme Court is unable to accept as constitutional a provision that provides for unguided legislative discretion in a non-conforming use permit situation, it seems doubtful that it would accept a permit requirement for establishment of an ordained use.

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[28] __ U.S. __, 110 S. Ct. 596 (1990).

[29] The Maryland Supreme Court struck down the same provision as a restraint on free speech in *Landover Books, Inc. v. Prince George's County*, 566 A.2d 792 (Md. 1989).

In *Cook County*, the case relied upon by Kenner in drafting its ordinance, the Illinois Supreme Court struck down the prior permit provision, finding that it gave county officials the power to discriminate on the basis of the content of the communication through selective enforcement. The ordinance, like the Kenner ordinance, contained no standards or guidelines for the board of commissioners to follow in deciding whether to grant or deny special use permits. Even though a special permit was not needed to locate in industrial zones, only in commercial zones, the court held the permit provision to be unconstitutional.

The Kenner ordinance would provide reasonable avenues of communication but for the permit provision. *Renton* does not mandate the city to provide an economically feasible site for plaintiff's bookstore. However, the permit requirement provides the Kenner City Council with unbridled discretion on whether or not to allow an adult bookstore to open. Thus, unless the permit provision can be severed from the ordinance it does not provide for reasonable alternative avenues of communication and should be struck down.

III.

Kenner Zoning Ordinance 6333 has no severability clause, but Kenner Comprehensive Zoning Ordinance 2427 has a general Severability Clause at section 23.04.[30]

An analogous situation occurred in *State v. Murphy*, 542 So. 2d 1373 (La. 1989), where a state statute required a court to ensure that a child victim could not hear or see accused defendant, unless viewing was necessary for identification. This

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[30] If any section, sub-section, paragraph, sentence, clause, or phrase of this Ordinance shall for any reason beheld [sic] unconstitutional by any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance which shall continue in full force and effect.

provision of the statute was contrary to a recent United States Supreme Court decision.[31] The statute itself contained no severability provision. The Louisiana Supreme Court looked to the general severability clause contained in La. Rev. Stat. Ann. 24:175, which contains essentially the same language as that found in Kenner Comprehensive Zoning Ordinance section 23.04.

The situation in *Murphy* paralleled the situation here. Thus, any unconstitutional permit requirement of the ordinance can be severed, allowing the remainder of Kenner Zoning Ordinance 6333 to stand.

IV.

LaGrange's next argument is that the Kenner Zoning Ordinance lacks an "inverse spatial provision," thus violating equal protection and due process. The ordinance prohibits an adult bookstore within 1,000 feet of other uses, but there is no requirement prohibiting these other uses from opening within 1,000 feet of an adult bookstore. LaGrange fears that if such a use were to open within the prescribed area, an adult use could be forced to relocate or be amortized out of business.

The zoning ordinance which restricts adult businesses to light and heavy industrial zones does not allow day centers, churches or residences as permitted uses.[32] Lagrange has not shown that any such uses exist in the industrial area or are likely to be built. A similar argument was dismissed in *Stone v. City of Maitland,*[33] as being speculative.

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[31] *Coy v. Iowa,* 487 U.S. 1012, 108 S. Ct. 2798 (1988).

[32] Day care centers are permitted uses in S-I zones, but limited to areas that are not dangerous to small children. Kenner Comprehensive Zoning Ordinance § 14.03.

[33] 446 F.2d 83 (5th Cir. 1971).

Because there is no evidence that any of the proscribed uses are contemplating opening up in an industrial zone, plaintiff's inverse spatial requirement argument should be rejected.

V.

In sum the court finds that the Kenner ordinance attempts to present a valid solution to what the city perceives as a problem. The City of Kenner's intent in enacting Kenner Zoning Ordinance 6333 was predominantly to avoid the spread of secondary effects of adult businesses. Protection of neighborhoods is a valid governmental interest, and Kenner's ordinance is designed to meet that interest. With the permit provision severed, the ordinance leaves the plaintiffs alternative avenues of communication. Thus, the court finds Kenner Comprehensive Zoning Ordinance 6333 constitutional.

New Orleans, Louisiana, this 19th day of March, 1991.

/s/ Patrick E. Carr
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3289

LAGRANGE TRADING COMPANY,
d/b/a Airline Bookstore,
Plaintiff-Appellant
Cross-Appellee,

versus

NICKY NICOLOSI, ET AL.,
Defendants-Appellees
Cross-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(FEBRUARY 12, 1992)

Before REAVLEY, HIGGINBOTHAM and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied. The motion to stay the mandate is likewise denied.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

APPENDIX D

Z-2-89

SUMMARY NO. 7012 ORDINANCE NO. 6333

AN ORDINANCE AMENDING THE TEXT OF ORDINANCE NO. 2427, ADOPTED BY THE KENNER CITY COUNCIL ON DECEMBER 4, 1978, THE COMPREHENSIVE ZONING ORDINANCE OF THE CITY OF KENNER, MORE PARTICULARLY AMENDING ARTICLE II, PURPOSE BY ADDING THERETO A NEW PARAGRAPH; SECTION 3.02. DEFINITION BY ADDING THERETO A NEW SUB-SECTION DESIGNATED AS SUB-SECTION 1A, ADULT BOOK/VIDEO STORES; ARTICLE XII, C-1, NEIGHBORHOOD COMMERCIAL DISTRICT, SECTION 12.02, PERMITTED USES, BY AMENDING SUB-SECTION 20 SO AS TO SPECIFICALLY EXCLUDE ADULT BOOK/VIDEO STORES AS PERMITTED USES; ARTICLE XIII- C-2. GENERAL COMMERCIAL DISTRICT, SECTION 13.02 PERMITTED USES, BY AMENDING SUB-SECTION 20 SO AS TO SPECIFICALLY EXCLUDE ADULT BOOK/VIDEO STORES AS PERMITTED USES; ARTICLE XV, L-I, LIGHT INDUSTRIAL DISTRICT, SECTION 15.02, PERMITTED USES, BY ADDING THERETO A NEW SUB-SECTION DESIGNATED AS SUB-SECTION 1A, ADULT BOOK/VIDEO STORES AND MASSAGE PARLORS; ARTICLE XVI - HEAVY INDUSTRIAL DISTRICT, SECTION 16.02 PERMITTED USES, BY ADDING THERETO A NEW SUB-SECTION DESIGNATED AS SUB-SECTION 1A. ADULT BOOK/VIDEO STORES AND MASSAGE PARLORS; AMENDING SUB-SECTION 66 AND 38 OF THE AFOREMENTIONED SECTIONS 15.02 AND 16.02 SO AS TO PROVIDE FOR THE TYPE AND SIZE OF THE PERMITTED

SIGNS FOR THESE USES; AMENDING ARTICLE XX - PLANNED UNIT DEVELOPMENTS, SECTION 20.08, SUB-SECTION A., PURPOSE OF PROVISIONS, BY ADDING THERETO A NEW PART DESIGNATED AS PART 5, SPECIFICALLY EXCLUDING ADULT BOOK/ VIDEO STORES AND MASSAGE PARLORS AS PERMITTED USES; PROVIDING AMORTIZATION PERIODS FOR BUSINESSES MADE ILLEGAL BY THIS ORDINANCE AND DIRECTING, AUTHORIZING AND EMPOWERING THE PLANNING DIRECTOR FOR THE CITY OF KENNER TO ALTER AND AMEND THE TEXT OF THE OFFICIAL AMEND THE TEXT OF THE OFFICIAL ZONING ORDINANCE OF THE CITY OF KENNER IN ACCORDANCE THEREWITH.

WHEREAS, on January 5, 1989, the Kenner City Council imposed a six (6) month moratorium on the issuance of occupational licenses or building permits to adult use type book/video stores and massage parlors in the City of Kenner; and,

WHEREAS, the administration was requested to perform a study on the issue and report back to the Council on its findings; and,

WHEREAS, after many meetings, a committee has prepared a report and a draft of a proposed ordinance that amends the text of ordinance No. 2427 (the Comprehensive Zoning Ordinance of the City of Kenner) as it is related to the location of adult book/ video stores and massage parlors, etc.; and,

WHEREAS, the City of Kenner zoning districts and zoning regulations were created for the purpose of promoting the public health, safety and general welfare of the community; and,

WHEREAS, after reviewing the findings of the administration's report, the City Council concludes that the current zoning ordinance and regulations fail to provide a definition of adult book/video stores; and,

WHEREAS, without such a definition it is difficult to establish in which zoning districts such establishments should be permitted.

THE KENNER CITY COUNCIL HEREBY ORDAINS:

SECTION I: That Article II, Purpose, be and the same is hereby amended by the addition of a new paragraph to read as follows:

> The zoning regulations and districts as herein set forth have been made in accordance with a comprehensive plan for the purpose of promoting the public health, safety, morals, conveniences, order, prosperity, and general welfare of the community. They have been designed to lessen congestion in the public streets, to secure safety from fire, panic and other dangers, to provide adequate light and air, to prevent the overcrowding of land, to avoid undue concentration of population, and to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. They have been made with reasonable consideration, among other things, as to the character of each district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the City.
>
> Furthermore, these zoning regulations govern the establishment of adult use businesses to serve a valid governmental interest. They recognize that such businesses would have a severe impact upon surrounding businesses and residences. The regulations by their terms are designed to prevent crime, protect the City's retail trade, maintain property value and generally protect the quality of the City's neighborhoods, commercial districts, and the quality of urban life, but not to suppress the expression of unpopular views.

SECTION II: That Article III, Definitions, Section 3.02, Definitions, be and the same is hereby amended by the addition of a new sub-section designated as Sub-Section 1A to read as follows:

1A. Adult Book/Video store. An Establishment having as a substantial or significant portion of its stock in trade, books, magazines, periodicals or video tapes which are distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities such as human genitals in a state of sexual stimulation or arousal, acts of human masturbation, sexual intercourse or sodomy, fondling or other erotic touching of human genitals, pubic region, buttock or female breast or relating to anatomical areas such as less than completely and opaquely covered human genitals, pubic region, buttock or female breast below a point immediately above the top of the areola or human genitals in a discernable turgid state, even if completely or opaquely covered.

SECTION III. That Article XII, C-1, Neighborhood Commercial District, Section 12.02, Permitted Uses, Sub-Section 20, be and the same is hereby amended to read as follows:

20. Stores and shops, except adult book/video stores, for the conduct of a retail business occupying not more than four thousand, five hundred (4,500) square feet of gross floor area.

SECTION IV. That Article XIII - C-2, General Commercial District, Section 13.02, Permitted Uses, Sub-Section 20, be and the same is hereby amended to read as follows:

20. Stores or shops, except adult book/video stores, for the conduct of a retail business occupying not more than twenty-five thousand (25,000) square feet of gross floor area, however, stores or shops exceeding twenty-five thousand (25,000) square feet of floor area require approval by the City Council per Section 23.02 when they are satisfied that such an increase will not destroy the intent of the district.

SECTION V. That Article XV, Light Industrial District, Section 15.02, Permitted Uses be amended by adding thereto a new sub-section designated as Sub-Section 1A to read as follows:

1A. Adult book/video stores and massage parlors only when located a minimum of one thousand (1,000) feet from any residence, church, school, nursery, day care center, or recreational facility or other adult book/video store or massage parlor, as measured from the closest property lines and only upo approval by the City Council per Section 23.02.

SECTION VI. That Article XVI, Heavy Industrial District. Section 16.02, Permitted Uses, be amended by adding thereto a new sub-section designated as Sub-Action 1A to read as follows:

1A. Adult book/video stores and massage parlors only when located a minimum of one thousand (1,000) feet from any residence, church, school, nursery, day care center, or recreational facility or other adult book/video store or massage parlor, as measured from the closest property lines and only upon approval by the City Council per Section 23.02.

SECTION VII: That Article XV, L-I, Light Industrial District, Section 15.02, Permitted Uses, Sub-Section 66, be amended to read as follows:

66. Signs as permitted in the C-2 District except adult book/video stores and massage parlors which are not allowed to have descriptive art or photographic signs depicting any activity related to or inferring, the nature of the business, as defined in Article III, Section 3.02, Sub-Section 1A; such businesses may have signs that contain alphanumeric copy only.

SECTION VIII: That Article XVI, Heavy Industrial District, Section 16.02, Permitted Uses, Sub-Section 38, be, and the same is hereby amended to read as follows:

38. Signs as permitted in the C-2 District except adult book/video stores and massage parlors which are not allowed to have descriptive art or photographic signs depicting any activity related to or inferring, the nature of the business, as defined in Article III, Section 3.02, Sub-Section 1A; such businesses may have signs that contain alphanumeric copy only.

SECTION IX. That Article XX - Planned Unit Developments, Section 20.08, Sub-Section A., Purpose of Provisions, be amended by adding thereto a new part designated as Part 5 to read as follows:

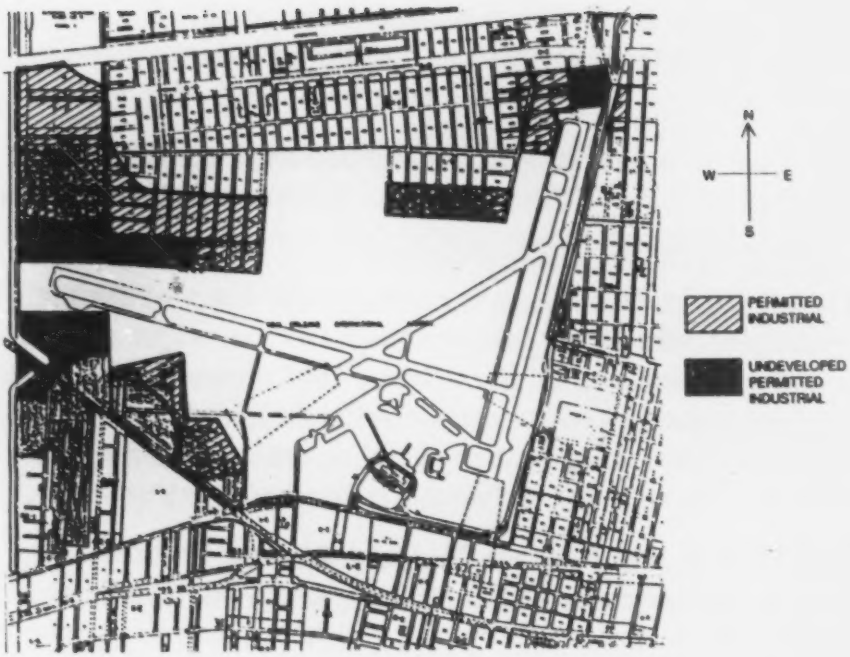
5. Adult book/video stores and massage parlors are not permitted uses under the provisions of this section.

SECTION X. That adult book/video stores or massage parlors that are made illegal by this ordinance have a six (6) month period to conform with the provisions of the ordinance or to amortize themselves out of business. In the event these illegal stores or parlors are still in violation after the initial six (6) month period, they have an additional six (6) months non-discretionary period to amortize themselves out of business or relocate.

SECTION XI. That the Planning Director for the City of Kenner, Louisiana, be and he is hereby empowered, authorized and directed to make the necessary and appropriate changes and amendments to the text of Ordinance No. 2427, the Comprehensive Zoning Ordinance of the City of Kenner.

SECTION XII. That the Council President be, and he is hereby empowered, authorized and directed to sign and execute all acts, and all documents necessary and proper in the premises to give full force and effect to the ordinance.

APPENDIX E



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NO. 91-1819

FILED
JUN 9 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

LAGRANGE TRADING COMPANY,
d/b/a AIRLINE BOOKSTORE
Petitioner

vs.

NICKY NICOLOSI,
AARON BROUSSARD,
CITY OF KENNER, LOUISIANA
Respondents

Opposition to Petition for Writ of *Certiorari* to the United States Court of Appeals for the Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Did the courts below err in finding that City of Kenner Ordinance No. 6333, a content-neutral time, place and manner zoning regulation, was designed to serve a properly supported governmental interest in a narrowly tailored manner which did not unreasonably limit alternative avenues of communication to an adult bookstore?

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OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

SUPPLEMENTATION OF STATEMENT OF THE CASE

Respondents do not suggest that Petitioner has misstated any fact. However, because Petitioner's Statement of the Case contains some factual characterizations and conclusions, and some relevant facts are omitted, Respondents respectfully supplement the Statement as follows:

I.

Petitioner's business, Airline Bookstore, displays and sells videos, tapes, films, magazines and books which portray or depict explicit sexual activities as well as sexually oriented paraphernalia. In addition, videotapes can be rented and viewed on the premises. These materials are available to adults only. (Stipulation of Facts 10 and 11).

II.

The Airline Bookstore is subject to the zoning ordinance at issue as an Adult Book/Video store. (Stipulation of Facts 10; Petition for Writ of *Certiorari*, p. 2).

III.

The Airline Bookstore was located within 1,000 feet of a residence and a residential zone. (Stipulation of Facts 19).

IV.

The areas within City of Kenner Light and Heavy Industrial zones in which an Adult Book/Video store may be located are not objectively "small." They consist of 357.07 acres of developed land, or 3.9 percent of the total area of the City, and 140 acres of presently undeveloped land, or 1.5 percent of the total area of the City.

V.

The City of Kenner's expert realtor, did not "eliminate" Light and Heavy Industrial areas south of the New Orleans International Airport as available for location of an Adult Book/Video store. His stipulated testimony

was that "[t]hose squares to the southwest of the New Orleans International Airport, that meet the criteria of the laws, are improved predominately with large warehouses that provide storage space for airport related activities. While there are several smaller office-warehouse type buildings, a greater preponderance of the improvements would not be realistically suitable for adult book/video store use. There is, however, an area of undeveloped land that is subdivided with dedicated streets that could eventually be available to such use. Access to this area is from Airline Highway." (Stipulation of Facts 24, Exhibit 15 at p. 1).

VI.

Available areas for operation of an Adult Book/Video store in Light and Heavy Industrial zones in the City of Kenner north of the New Orleans International Airport, though arguably "unsuited to a retail use such as a bookstore or a video rental establishment," (Stipulated testimony of Mr. Michael W. Truax, Petitioner's expert real estate broker/agent), are "feasible for adult book/video store use. . . . Adult book/video stores offer products and activities that would be considered specialty items and therefore, location, visibility and access are not as important as they would be for a bookstore or other retail outlet. Products offered are generally not sought out by competitive pricing or quality shopping, and therefore, above factors have no effect on the feasibility of such use in areas examined." (Stipulated testimony of Mr. Albert V. Eason, Respondents' expert realtor.)

SUMMARY OF ARGUMENT

This Court has previously upheld zoning ordinances restricting operation of adult businesses within 1000 feet of

a residential district. Because the City of Kenner does not have a central commercial or business district, but rather is a suburban, bedroom community of New Orleans, its desire to preserve the quality of urban life by precluding adult businesses from locating near residential districts or family-type commercial areas required limiting such businesses to Light and Heavy Industrial districts. Petitioner also complains that the ordinance forced it to relocate after a number of years at its prior location. Ordinances requiring amortization have previously been upheld and Petitioner cites no authority or rationale for its suggestion that the number of years a business has operated at a location is a relevant factor to be considered when the constitutionality of an otherwise permissible time, place and manner zoning restriction is challenged.

The evidence relied on by the City of Kenner in passing its ordinance concerning the secondary effects of adult oriented businesses was clearly sufficient to meet the criteria this Court established in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). In addition, although Petitioner complains of combined distance and concentration regulations, it does not establish, on the stipulated facts, that the ordinance does not meet the *City of Renton* requirement that Petitioner be provided a reasonable opportunity to operate an adult bookstore in the City of Kenner.

Petitioner also fails to demonstrate error in the District Court's conclusion that "any available sites" satisfies the test of alternative avenues of communication in this case. The District Court based this conclusion on the stipulated evidence that the ordinance permits operation of an adult book/video store in four areas, with a number of sites within each area. These available sites satisfy the requirement that alternative avenues of communication be

provided for adult book/video businesses.

Ordinance No. 6333, adopted by the City of Kenner, does not allow petitioner's adult bookstore to continue to operate in the Special Industrial district in which it was located because that district is within 1000 feet of a residential neighborhood, as are all districts classified Special Industrial. Thus, relocation to Light Industrial or Heavy Industrial districts was required to accomplish Kenner's purpose of preserving neighborhoods and commercial districts. The ordinance is only as broad as it needed to be.

REASONS FOR DENYING WRIT OF *CERTIORARI*

The District Court decision as affirmed by the United States Court of Appeals for the Fifth Circuit does not raise issues of a character which fulfill the requirements of Rule 10, Rules of the Supreme Court of the United States, with the exception of the issue addressed in the Cross Petition for Writ of *Certiorari*. These decisions resolved the First Amendment issues addressed by Petitioner on grounds that in no way conflict with applicable decisions of this Court or decisions of other courts.

I
THIS COURT'S CASES ESTABLISH CLEAR LEGAL STANDARDS APPLICABLE TO ZONING OF BUSINESSES DISTRIBUTING SEXUAL MATERIALS ON ALL ISSUES ADDRESSED BY PETITIONER

PETITIONER'S POINTS I, IV AND V

In *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), this Court